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No. 01-1247

In The

Supreme Court of the United States

STATE OF WISCONSIN,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
CHRISTINE WHITMAN, and
SOKAOGON CHIPPEWA COMMUNITY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF AMICUS CURIAE OF THE STATES OF IDAHO, ALASKA, FLORIDA, KANSAS, NEVADA, NORTH DAKOTA, SOUTH DAKOTA, TEXAS, UTAH, AND WYOMING IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE

The States of Idaho, *et al.*, through their respective Attorneys General pursuant to S. Ct. R. 37.4 respectfully submit a brief amicus curiae in support of petitioner.

INTERESTS OF AMICI CURIAE STATES

Environmental quality is a core sovereign concern for all States. Implicit in this concern is preserving authority to regulate conduct that may or does affect the environment. *See Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907) ("[T]he state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air"). The States' preeminent place in environmental regulation has not been ignored by Congress, which carefully structured much of its environmental legislation to provide States with the opportunity to implement their laws not only independently of that legislation but also in lieu of federal regulation. *E.g.*, Federal Water Pollution Control Act ("Clean Water Act" or "CWA"), 33 U.S.C. §§ 1251-1387; Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300f-300j-26; Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k; Clean Air Act ("CAA"), 42 U.S.C. §§ 7401-7671q. This sovereign interest in controlling environmental quality assumes even greater weight where navigable streams or lakes are involved because of the States' ownership and trust interest deriving from operation of the Equal Footing Doctrine. *See Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 283 (1997) (relief quieting title in Indian tribe "[n]ot only would . . . block all attempts by [state] officials to exercise jurisdiction over a substantial

portion of land but also would divest the State of its sovereign control over submerged lands, lands with a unique status in law and infused with a public trust the State itself is bound to respect").

To be sure, the States' interests are not beyond congressional control. The Interstate Commerce Clause, U.S. Const. art. I, § 8, cl. 3, encompasses federal regulation of waters "navigable in fact or which could reasonably be so made." *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001). This Court has held further that "[a]lthough States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated powers, such as treaty making." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999). The Clean Water Act makes special provision in section 518, 33 U.S.C. § 1377, for Indian tribes to be accorded "treatment as a State" ("TAS") for specified reservation "water resources," and the court of appeals reasoned below that "[b]ecause the state does not contend that its ownership of the beds would preclude the federal government from regulating the waters within the reservation, it cannot now complain about the federal government's allowing tribes to do so." Pet. 9a-10a.

That statement by the Seventh Circuit lies at the heart of the questions presented and the amici States' concerns. The issue here is not whether *Congress* can regulate water quality standards on Rice Lake. It is instead whether, given the unchallenged construction by the Environmental Protection Agency ("EPA") that section 518 does not contain a delegation of federal power, respondent

Sokaogon Chippewa Community ("Band") can so regulate as a matter of retained inherent authority under principles described in *Montana v. United States*, 450 U.S. 544 (1981). *See* 56 Fed. Reg. 64,876, 64,880 (1991) (Pet. 104a-105a).[1] In upholding the agency action, the court of appeals credited the EPA's application of the second *Montana* "exception" to the general principle that tribes lack inherent authority over nonmembers or their property. The court's determination, like the underlying agency decision, betrayed a fundamental misunderstanding of *Montana* principles, which limit the exception's applicability to situations where state law impermissibly interferes with tribal self-governance and thereby is preempted.

The Seventh Circuit's acceptance of the analytical approach used by the EPA to grant the Band's request for

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[1] Petitioner describes the nature of the 1991 TAS regulations in detail. Pet. 5-8. It nonetheless warrants mention that the SDWA and CAA also contain TAS provisions. 42 U.S.C. §§ 300h-1(e), 300j-11(b)(1) (SDWA); 42 U.S.C. § 7601(d)(1)(A) (CAA); *see also Backcountry Against Dumps v. EPA*, 100 F.3d 147 (D.C. Cir. 1996) (rejecting EPA's construction of RCRA as authorizing TAS status for tribes). The EPA has interpreted the TAS provision in the SDWA identically with that in the CWA – i.e., as conditioning TAS status on the existence of inherent authority over the regulated activity (59 Fed. Reg. 64,339 (1994)) – while it has construed the CAA provision as a delegation of federal authority (63 Fed. Reg. 7254 (1998)). *See Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000) (deferring to EPA's construction of the CAA's TAS provision as delegation), *cert. denied*, 532 U.S. 970 (2001). Neither petitioner nor the amici States dispute in this matter Congress' power to regulate water quality in commercially navigable waters or to permit tribal regulation of water quality standards in lieu of EPA control where inherent tribal authority exists over the affected water resource.

TAS status has significance far beyond the water-quality-standards application here. As of March 1998 – four years ago – the EPA had granted TAS or program approval status for more than 130 tribes across the country with respect to CWA-related activities. *Treatment of Tribes in the Same Manner as States/Program Approval Matrix* (Mar. 1998) <http://www.epa.gov/indian/matrix.htm> (last visited Apr. 6, 2002). Because the EPA is proceeding aggressively to implement section 518, its erroneous understanding of substantive Indian law principles will compromise a significant and growing number of TAS determinations. The time has come for this Court to intervene, correct the agency's mistake, and avoid misfocused litigation over TAS decision-making and potential interference with fundamental state sovereign interests. *See Montana v. USEPA*, 137 F.3d 1135 (9th Cir.), *cert. denied*, 525 U.S. 921 (1998); *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996).

STATEMENT

I. The Secretary of the Interior is authorized under section 5 of the Indian Reorganization Act, 25 U.S.C. § 465, to acquire in trust land "for the purpose of providing land for Indians" and under section 7, *id.* § 467, to "proclaim new Indian reservations on [such] lands." In 1939 the Assistant Secretary exercised this authority to declare approximately 1,438 acres in Forest County, Wisconsin, a reservation for the Band. Pet. 19a, 108a. The reservation, commonly known as the Mole Lake Reservation (*e.g.*, Pet. 50a, 58a, 71a), has been increased to 1,850 acres through acquisition of additional trust lands. Pet. 50a, 110a. These acquisitions did not include the bed and

banks of Rice Lake, a water body almost entirely surrounded by the acquired lands. *See* Pet. 120a. The Lake is navigable, with approximately one-third of its water supplied by Swamp Creek whose headwaters arise off reservation but which also flows downstream from the reservation after leaving the Lake. Pet. 51a, 120a.

In August 1994, the Band sought TAS status from the EPA for the purpose of promulgating water quality standards under section 303 of the CWA, 33 U.S.C. § 1313, with respect to all water resources within the reservation. Pet. 57a; *see* 40 C.F.R. § 131.8 (2001) (Pet. 89a). The application was granted in September 1995. Pet. 37a. The responsible EPA regional administrator, in requesting concurrence from higher agency officials with his recommendation that the application be granted, described Rice Lake as "prime habitat for the largest single stand of inland emergent wild rice in the world." Pet. 51a. He further observed that "[w]ild rice serves as the foundation for the Band's diet, as it has for centuries" and is "critical to the Band's economy, with a portion of it sold to other Tribes and inter-Tribal organizations as seed." *Id.*; *see Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 351-58 (7th Cir. 1983) (discussing Chippewas' treaty history and reservation of usufructuary rights on ceded lands). While acknowledging that "the relationship between wild rice and water quality is only beginning to be understood," the regional administrator stated that "it is clear from the disappearance of wild rice over much of its range that wild rice is sensitive to environmental changes." *Id.* He reasoned that "[t]he Band's water quality standards provide a mechanism for protecting this important resource." *Id.* There was nevertheless no finding either that the Lake's

water quality was deteriorating or that the wild rice stand was being diminished through on-reservation "environmental changes."

In concurring with the regional director's recommendation, the EPA's Office of General Counsel noted the Band's obligation under section 518 to "demonstrate [its] authority and capability" to regulate affected waters in the reservation. Pet. 45a. That requirement was deemed satisfied, since "the Band clearly has regulatory authority over all members of the Band" and "[s]ince all of the Reservation lands are trust lands, the Band will necessarily possess authority over all persons on Reservation lands who may be engaging in activities that may affect the quality of those waters." *Id.* The Office of General Counsel additionally expressed its " 'doubt that, in the case of a reservation such as this one, where *all* the lands (except perhaps those within the navigable waters themselves) are Tribal trust lands, a court would even find the need to examine the scope of Tribal authority over non-members' activities (since there are no non-Indian lands owned in fee by non-members, only lands arguably owned by the State).' " Pet. 45a-46a. Were such analysis undertaken, however, "the Band could easily establish jurisdiction by showing that the effect of the activities of such non-members on the health and welfare of the Band would be 'serious and substantial.' " Pet. 46a. "In particular," the concurrence stated, "Rice Lake, the largest water body, is a prime source of wild rice which serves as a significant diet and economic resource for the Band." Pet. 46a-47a.

The Office of General Counsel, like regional officials, dismissed the significance of Wisconsin's claimed title to the bed and banks of Rice Lake. "[E]ven if the State did

retain title to the beds of the Mole Lake Reservation, EPA could . . . properly conclude that the Band has adequate civil regulatory authority over the water resources on the Reservation to establish water quality standards under Section 303 of the CWA." Pet. 44a. Wisconsin's title to the Lake's submerged land, in short, was deemed irrelevant to resolving the scope of the Band's inherent authority. *See also* Pet. 58a (analysis by Office of Regional Counsel stating that "[t]he statutory scheme of the Clean Water Act does not link ownership of lake beds with regulation of water quality" and that "the Act contemplates geographic location of the water resources [on a reservation] as the determinative factor").

II. Petitioner unsuccessfully sought judicial review of the EPA's action granting the Band's application for TAS status to administer its water quality standards program. Pet. 1a, 15a. The district court quoted extensively from the regional administrator's and the Office of General Counsel's recommendation memoranda and, despite indicating some doubt over the correctness of the agency's construction of section 518(e)(2) in its 1991 rulemaking, deferred to that interpretation because "both the statute and legislative history are ambiguous" and "[t]he EPA's construction is reasonable and permissible." Pet. 32a. The court of appeals' substantive reasoning differed significantly from the district court's and was divided into three components, the last two of which are germane to the questions presented.

The Seventh Circuit first rejected the contention that the Band lacked inherent authority over the Rice Lake "water resource" because of petitioner's "ownership of the underlying lake beds" pursuant to the Equal Footing Doctrine. Pet. 7a. Like the EPA, the court deemed it

unnecessary to resolve the ownership issue on the merits, since it found "pertinent . . . a number of legal principles all of which support the EPA's determination that a state's title to a lake bed does not in itself exempt the waters from all outside regulation." Pet. 9a. Even as to such waters, it reasoned, Congress has regulatory power where navigability exists for Interstate Commerce Clause purposes. *Id.* The court additionally relied on Congress' authority under the Indian Commerce Clause and suggested, but did not hold, that "in the absence of tribal TAS status, the EPA and not [petitioner] might well be the proper authority to administer the Clean Water Act programs for the reservation, because state laws may usually be applied to Indians on their reservations only if Congress so expressly provides." *Id.* It concluded this aspect of the opinion with the statement that because petitioner did "not contend that its ownership of the beds would preclude the federal government from regulating the waters within the reservation, it cannot now complain about the federal government allowing the tribes to do so." Pet. 9a-10a.

The Seventh Circuit next rejected what it characterized as petitioner's argument that "the Band did not make the required showing of authority over those activities potentially affected by its imposition of water quality standards." Pet. 10a. The "activities" referred to were petitioner's purportedly "planned construction of a huge zinc-copper sulfide mine on the Wolf River, upstream from Rice Lake" and off reservation. Pet. 5a.[2] The "extra-territorial effect" postulated by the court derived from

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[2] As petitioner points out, the court of appeals' statement in this regard was wrong on several counts – i.e., petitioner is not seeking to construct the involved mine, and the proposed facility is not on the Wolf River which is *downstream* from the

section 518(e)'s direction to the EPA to establish a "mechanism" for resolving "any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water" and the attendant possibility that more stringent tribal standards could affect off-reservation, upstream water use. Pet. 12a-13a; *see City of Albuquerque*, 97 F.3d at 423-24. That possibility did not negate the Band's claim of inherent power in the Seventh Circuit's view because "this authority is not defeated even if it exerts some regulatory force on off-reservation activities" and because "[w]hether the tribe or the state ultimately 'wins' in the dispute, it is the EPA, not the tribe or the state, that has the ultimate authority to decide whether or not to issue a permit." Pet. 13a.

ARGUMENT

WHETHER A TRIBE POSSESSES INHERENT AUTHORITY OVER "WATER RESOURCES" BELONGING TO A STATE RAISES IMPORTANT QUESTIONS OF STATE SOVEREIGNTY AND INDIAN LAW, AND THIS COURT SHOULD REMOVE ANY DOUBT OVER THE APPROPRIATE ANALYSIS FOR RESOLVING THAT QUESTION.

I. The Seventh Circuit's Analysis Failed To Address The Controlling Issue In This Matter: Whether Wisconsin Water Quality Standards Are Preempted From Application To Rice Lake.

Section 518(e)(2) of the CWA is the focus of this controversy. One of several requirements conditioning

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reservation. Pet. 10 n.4. There is also no factual support in the administrative record for the implication that the mine's development would prejudice Rice Lake's water quality.

EPA's authority to treat an Indian tribe as State for section 303 purposes, it demands a showing that "the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation[.]" 33 U.S.C. § 1377(e)(2). The EPA, as discussed above, construed section 518(e)(2) in the 1991 TAS regulations as not constituting a delegation of federal authority but, instead, as requiring a tribe to establish under Indian law principles that it possesses inherent authority to regulate the involved water resources. *See* 56 Fed. Reg. at 64,880.[3] The agency further construed the provision to

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[3] In so determining, the EPA also discussed what it characterized as "the contrary conclusion" adopted by four members of this Court in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (opinion of White, J.). Justice White stated with respect to the issue there, which involved application of a tribal zoning ordinance to nonmember-owned lands, that "[t]here is no contention . . . that Congress has delegated to the Yakima Nation the power to zone fee lands of nonmembers of the Tribe. *Cf.* 18 U.S.C. §§ 1151, 1161 (1982 ed., Supp. V); 33 U.S.C. § 1377(e) and (h)(1) (1982 ed., Supp. V)." *Id.* at 428. The EPA's assumption that the reference to the several statutes was intended to identify examples of delegation of federal power is problematic since, as this Court recently explained, "[s]ection 1151 simply does not address an Indian tribe's inherent or retained sovereignty over nonmembers on non-Indian fee land." *Atkinson Trading Post Co. v. Shirley*, 532 U.S. 645, 653 n.5 (2001). The Court did characterize § 1161 as a delegation of federal authority in *United States v. Mazurie*, 419 U.S. 544, 577 (1975), but it is hazardous to assert that the "*cf.*" reference to section 518(e)(2) and the definition of "Federal reservation" in section 518(h)(2) was

authorize TAS status over *any* water resource within a reservation as to which the required showing of inherent power and the other statutory preconditions was made. *Id.* at 64,881-82. This latter construction was premised on reading "the phrase 'or otherwise within . . . ' as a separate category of water resources and also as a modifier of the preceding three categories of water resources, thus limiting the Tribe to acquiring treatment as a State status for the four specified categories of water resources within the borders of the reservation." *Id.* at 64,881.

Each construction is critical here. While the importance of the first is plain, the expansive interpretation of section 518(e)(2) as encompassing reservation water resources in addition to those held by or for a tribe or a tribal member leads directly to the problem at hand, since both the EPA and the court of appeals held those resources to include navigable water bodies whose submerged lands are owned by a State under the Equal Footing Doctrine. The Seventh Circuit, like the EPA, assumed that because the Band's proposed water quality standards only regulate persons who "discharge" into Rice Lake, those persons constituted the class against which the scope of its authority must be measured. Pet. 2a-3a, 45a-46a. Given the fact that the only likely dischargers into the Lake are tribal members, the court thus did not direct a *Montana*-based analysis to their conduct,

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intended to signal the "conclusion" that those provisions exemplify a delegation of federal power. In context, the reference is viewed more properly as merely suggesting the possibility that section 518(e)(2) might be *claimed* by a litigant to constitute a delegation – a claim or "contention" that had not been raised concerning the tribal zoning ordinance.

focusing instead on whether *Montana* limits tribal authority to adopt water quality standards which may have an indirect impact on discharges *outside* the reservation and ultimately concluding that this "extraterritorial effect" was "beyond the scope of *Montana*, which concerned only tribal authority over non-member activities on reservation fee lands." Pet. 11a.

The court of appeals' analysis ignored that, as a legal and practical matter, what is being regulated is Rice Lake and that, in so regulating, the Band attempts to displace state regulation with its own. An Indian tribe nevertheless cannot "preempt" state law by exercise of its inherent authority; only federal law can accomplish that end through the Supremacy Clause, U.S. Const. art. VI, cl. 2. *See Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 156 (1980). By necessary implication, therefore, the TAS determination can stand only if Wisconsin water quality standards are foreclosed from application to Rice Lake by federal common law principles – an issue the Seventh Circuit skirted. This Court should clarify the centrality of the preemption inquiry in section 518 TAS determinations.

II. The Seventh Circuit Ignored This Court's Repeated Holding That, In Determining Whether Inherent Tribal Authority Exists So As To Displace State Regulation, The *Williams* Preemption Standard Must Be Applied.

Petitioner has challenged not only the EPA's application of the second *Montana* exception but also the Band's authority to regulate state-owned waters as a categorical matter. These challenges, while embodied in separate

questions presented, raise interrelated issues of state sovereignty and Indian law that are controlled by the three most recent decisions of this Court concerning the scope of inherent tribal authority: *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), *Atkinson Trading*, and *Nevada v. Hicks*, 533 U.S. 353 (2001).

A. *Strate* was the first case in which this Court reached the merits of a claim that a tribal court lacked civil adjudicatory authority over a nonmember involved in an on-reservation accident with another nonmember. In deciding the issue, the Court characterized *Montana* as "describ[ing] a general rule that, absent congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions." 520 U.S. at 446. It then rejected the contention that the second of those exceptions – whether the involved conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe" (*Montana*, 450 U.S. at 566) – permitted exercise of tribal court jurisdiction because on-reservation careless driving "surely jeopardize[s] the safety of tribal members" (*Strate*, 520 U.S. at 458):

> Read in isolation, the *Montana* rule's second exception can be misperceived. Key to its proper application, however, is the Court's preface: "Indian tribes retain their inherent power [to punish tribal offenders], to determine tribal membership, to regulate domestic relations among members, and to regulate rules of inheritance for members. . . . But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations." . . . Neither regulatory nor adjudicatory authority over the state highway

> accident at issue is needed to preserve "the right of reservation Indians to make their own laws and be ruled by them."

Id. at 459 (citations omitted). *Strate* thus established that, despite the second exception's reference not only to a tribe's "political integrity" but also to its "economic security[ ] or health or welfare," the "[k]ey" to resolving questions over the exception's breadth lies in the *preemption* standard articulated in *Williams v. Lee*, 358 U.S. 217, 220 (1959). That standard, as explained in *Strate*, asks whether application of state law as the rule of decision in a controversy would impermissibly infringe on tribal self-government rights.

This Court revisited the second exception in *Atkinson Trading*, where a nonmember trading post owner challenged a tribal hotel occupancy tax imposed on its guests. After concluding that *Montana*'s core presumption against the existence of inherent tribal authority existed, the Court shifted the burden to tribal officials to show the presence of one or both of the exceptions. As to the second, it rejected the argument that the provision of tribal government services, employment of tribal members, benefiting from reservation-attracted tourism, or the fact that the trading post was surrounded by tribal lands provided an appropriate basis for the exception's applicability. This Court reasoned that "unless the drain of the nonmember's conduct upon tribal services and resources is so severe that it actually 'imperil[s]' the political integrity of the Indian tribe" (532 U.S. at 657 n.12), the exception would be unavailable and observed that, "[w]hatever effect petitioner's operation of the Cameron Trading Post might have upon surrounding Navajo land, it does not

endanger the Navajo Nation's political integrity" (*id.* at 659).

Hicks followed the *Strate-Atkinson Trading* pattern of proscribing the nonconsensual reach of inherent tribal authority beyond that necessary to protect tribal self-government or to preserve internal relations. Although the issue there dealt with the assertion of tribal court jurisdiction over state game wardens, this Court reasoned that since inherent tribal adjudicatory power cannot exceed tribal legislative authority and since the tribe's legislative reach under *Montana* standards did not encompass regulating on-reservation service of process in connection with off-reservation criminal offenses, the tribal court lacked jurisdiction. 533 U.S. at 357-58.

One aspect of the ensuing analysis of tribal legislative authority stands out for present purposes: The *Hicks* Court held the *Montana*-derived presumptive absence of tribal jurisdiction unrebutted because tribal regulation of the state officers was not essential to protecting tribal self-government or to controlling internal relations and, in so holding, found it unnecessary to refer to the second exception explicitly. It thus described *Montana* as standing for the broad principle that "[t]ribal assertion of regulatory authority over nonmembers must be connected to th[e] right of the Indians to make their own laws and be governed by them." 533 U.S. at 361. The Court then applied the *Williams* interest-balancing standard to determine whether the game wardens had acted beyond the federally permissible reach of state authority. "State sovereignty," it observed, "does not end at a reservation's border" (*id.*) notwithstanding the absence of "the same degree of regulatory authority within a reservation" (*id.* at 362) as possessed off reservation by a State. Such

sovereignty existed in the *Hicks* controversy because the ability to serve process on reservation with respect to off-reservation conduct "is necessary to 'prevent [such areas] from becoming an asylum for fugitives from justice' " and because "[t]he State's interest in execution of process is considerable[.]" *Id.* at 364.

B. The Seventh Circuit referred to these cases in its decision but did not address their significance other than to state that the 1991 TAS regulations "track" *Strate* "by noting [inherent] authority is generally proper because 'water quality management serves the purpose of protecting public health and safety, which is a core governmental function, whose exercise is critical to self-government.' " Pet. 10a-11a. The court's isolated statement, however, failed to recognize that under the *Williams* preemption standard "[t]he principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." *Colville*, 447 U.S. at 156; *accord Hicks*, 533 U.S. at 362. No such interest balancing occurred below.

Undertaking what the Seventh Circuit should have conducted – i.e., an inquiry into the pertinent federal, state and tribal interests – is revealing. *First*, the most telling manifestation of the federal interest under the CWA is its "State authority," or savings, provision in section 510, 33 U.S.C. § 1370. Pet. 84a. As the Seventh Circuit held twenty-five years ago, "[s]ection 510 preserves in general terms the right of any state to impose limitations and standards more stringent than those adopted under the Act." *United States Steel Corp. v. Train*, 556 F.2d 822, 830 n.5 (7th Cir. 1977). Indeed, the EPA has

long deferred to Wisconsin water quality standards and enforcement mechanisms outside Indian country – implicit recognition that the State's standards are no less stringent than those adopted by the EPA under the CWA. *E.g.*, 46 Fed. Reg. 1021 (1981); 52 Fed. Reg. 3700 (1987); 65 Fed. Reg. 50,528 (2000); 66 Fed. Reg. 65,957 (2001). It also warrants noting that, despite their eligibility for TAS status, tribes neither are nor can be deemed a "State" under section 510, a congressional determination indicating that the statute itself does not invest tribal water quality standards with a preemptive effect. 33 U.S.C. §§ 1362(3), 1377(e); *see City of Albuquerque*, 97 F.3d at 423. This conclusion is paralleled by settled principles of statutory construction:

> When "Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute. . . . ' " This principle applies when Congress "intends to pre-empt the historic powers of the States" or when it legislates in " 'traditionally sensitive areas' " that " 'affec[t] the federal balance. . . . ' " In such cases, the clear statement principle reflects "an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."

Raygor v. Regents, 122 S. Ct. 999, 1006 (2002) (citations omitted). Here, Congress altered through the CWA the " 'usual constitutional balance between the States and the Federal Government' " only to the extent provided under section 510.

Second, the state interest is compelling. This Court reiterated only last Term that "[d]ue to the public importance of navigable waterways, ownership of the land underlying such waters is 'strongly identified with the sovereign power of government.' " *Idaho v. United States*, 533 U.S. 262, 273 (2002). In a prior related decision, the Court rejected the contention that a distinction could be drawn between state officials and the State itself for purposes of relief under *Ex parte Young*, 209 U.S. 123 (1908), given the admittedly "immediate effect on [state] jurisdictional control over important public lands" underlying a navigable lake. *Coeur d'Alene Tribe*, 521 U.S. at 282. In short, "[b]ecause title to such land was important to the sovereign's ability to control navigation, fishing, and other commercial activity on rivers and lakes, ownership of this land was considered an essential attribute of sovereignty." *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987). There simply can be no legitimate dispute over the importance to petitioner's sovereignty of the ability to determine and enforce water quality standards on navigable waters within its boundaries – particularly where, as here, those waters are interconnected with streams or other water bodies that admittedly fall underneath its regulatory aegis.

Last, tribal self-government interests are minimal. Not only does the administrative record contain no evidence that Wisconsin water quality standards are inadequate to protect any usufructuary or other rights that tribal members may have with respect to resources in or on Rice Lake, but the second *Montana* exception also "is triggered by *nonmember conduct* that threatens the Indian tribe." *Atkinson Trading*, 532 U.S. at 657 n.12. Nothing precludes the Band, in other words, from regulating its

own members, and its failure to engage in such regulation cannot be employed to justify application of the second exception. To the extent the Band may be concerned about off-reservation mining or other impacts on the Lake by nonmembers, it has recourse to state administrative and judicial procedures to avoid prejudice to any claimed "protectible interest." *E.g.*, Wis. Stat. §§ 281.15, 281.31; Wis. Admin. Code §§ 102.01-102.14, 115.01-115.06; *see Brendale*, 492 U.S. at 430-31 (opinion of White, J.). This Court accordingly has never suggested that off-reservation nonmember conduct may serve as a predicate for invoking the second exception with respect to on-reservation regulation.

A *Williams*-based accommodation of federal, state and tribal interests thus cuts against finding the existence of the Band's regulatory authority over Rice Lake water quality where petitioner's ownership of the Lake's bed and banks is assumed. Indeed, the strength of the state interest and the absence of meaningful, countervailing federal or tribal interests support the categorical rule advanced by petitioner. *Cf. California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987) (state and tribal interests need not be rebalanced in each case where state taxation of tribal members is involved, since "the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak"). Regardless of whether it reaches the merits of the preemption issue here, however, the Court should take this opportunity to explain the proper analytical structure for making TAS determinations.[4]

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[4] The amici States recognize that the EPA and the Seventh Circuit assumed, but did not determine formally, petitioner's

Absent such guidance, lower courts will continue to misapply *Montana* standards and, therefore, section 518 of the CWA.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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ownership of Rice Lake's submerged lands. While this issue thus may be appropriate for resolution in remand proceedings, the amici are constrained to observe that, in light of the reservation's administrative creation almost a century after Wisconsin statehood, pursuant to legislative authority enacted in 1934, and the exclusion of the Lake from the description of the lands acquired for the reservation, no plausible basis exists to negate such ownership. *See, e.g., Idaho*, 533 U.S. at 280 n.9.